

[Appearing Counsel on next page]

FILED

DISTRICT COURT OF GUAM

JUN - 8 2007

MARY L.M. MORAN
CLERK OF COURT

DISTRICT COURT OF GUAM

TERRITORY OF GUAM

JULIE BABAUTA SANTOS, *et al.*,

Petitioners,

-v-

FELIX P. CAMACHO, *et al.*

Respondents.

Civil Case No. 04-00006

**JOINT MOTION OF PETITIONERS
AND RESPONDENTS IN SANTOS
AND TORRES FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT AGREEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**CHARMAINE R. TORRES, *et al.*,

Plaintiffs,

-v-

GOVERNMENT OF GUAM, *et al.*,

Defendants.

[ORAL ARGUMENT REQUESTED]

Civil Case No. 04-00038

MARY GRACE SIMPAO, *et al.*,

Plaintiffs,

-v-

GOVERNMENT OF GUAM,

Defendant.

-v-

FELIX P. CAMACHO, Governor of Guam,

Intervenor-Defendant.

Civil Case No. 04-00049

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MOTION

Julie B. Santos, Petitioner in CV04-00006, individually and on behalf of all those similarly situated (hereinafter "EIC Class"), through her attorneys of record Phillips and Bordallo, P.C., by Interim Class Counsel Michael F. Phillips; Charmaine R. Torres, Petitioner in CV04-00038, through her attorneys of record Lujan Aguigui & Perez LLP, by Peter C. Perez; "); Governor of Guam Felix P. Camacho (hereinafter "Governor Camacho"); Director of Revenue & Taxation Artemio B. Ilagan and the Director of Administration Lourdes M. Perez (hereinafter the "Directors") submit this Joint Motion for Final Approval of Class Action Settlement Agreement. The moving parties base this Motion on the Memorandum of Points and Authorities filed concurrently herewith, the record before the Court, and all other arguments and evidence this Court may otherwise permit.

Respectfully submitted this 8 day of June, 2007.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Petitioners and Respondents in the Santos and Torres actions respectfully submit this Memorandum of Points and Authorities in Support of their Joint Motion for Final Approval of Class Action Settlement Agreement.

In light of the disputed issues involved in this litigation concerning the liability of the Government of Guam to pay Earned Income Tax Credits ("EIC") to eligible Guam taxpayers since 1995, the inherent uncertainties and risks involved in further litigation, the benefits to be received and potential recovery for EIC class members pursuant to the Settlement Agreement, and the expense and burden of continued litigation, the Moving Parties agree that settlement on the terms and conditions set forth in the Settlement Agreement is fair and reasonable and in the best interests of the Moving Parties and of the Class sought to be certified.

As set forth in further detail in this filing, the Moving Parties submit that the Settlement Agreement satisfies the requirements for a final fairness evaluation by the Court. Accordingly, the Moving Parties are requesting that the Court issue an order that:

- Grants final approval to the Settlement Agreement filed concurrently herewith;
- Approves Final Certification of the Settlement Class, as defined in the Settlement Agreement and amended pursuant to the parties' agreement of January 4, 2007, pursuant to this Joint Motion and a separate motion to be filed with the Court within a few days and within the time frame provided for under the Settlement Agreement;
- Grants such other and further relief as the Court deems just and proper.

II. SUMMARY OF THE LITIGATION

On February 12, 2004, Petitioner Santos initiated a Class Action Petition for the recovery of unpaid refundable earned income tax refunds and to compel the full implementation of the Earned Income Program. In August of 2004, Petitioner Torres instituted a similar action. Pursuant to the Court's Order of March 21, 2006, both matters,

1 previously consolidated for trial, entered mediation on April 6, 2007. The mediation,
2 facilitated by the Honorable William J. Cahill, resulted in the Settlement Agreement
3 attached herein as Exhibit "A" which forms the basis for the instant motion. Petitioners in
4 a third consolidated case, CV04-00049, are not party to the Settlement Agreement or the
5 instant Motion.

6 **III. ARGUMENT SUPPORTING FINAL APPROVAL**

7 **A. Summary of the Settlement Agreement**

8 As discussed in the Joint Motion for Preliminary Approval of Class Settlement
9 Agreement, the agreement contains provisions addressing the following substantive
10 issues:

11 **1. Definition of the EIC Class.**

12 As the parties agreed during the hearing on January 4, 2007 and as described in
13 the Amendment to the Joint Motion for Conditional Certification of the EIC Class for
14 Settlement Purposes, the EIC Class is now defined as follows:

15 All persons who do not elect to request exclusion from the class
16 under the procedures described below and: (1) were subject to the
17 Guam Territorial Income Tax ("GTIT") established in 48 U.S.C. §
18 1421i for tax years 1995-1996 and/or 1999-2004 and would have
19 been eligible to file for the EIC established in 26 U.S.C. § 32 (as it
20 applied in each respective tax year) if that program were applied in
21 the Territory of Guam, and filed a timely tax return for the applicable
22 tax year or year(s) in which the credit is sought; and/or (2) were
23 eligible to receive an EIC credit under certain Guam territorial laws
24 for tax years 1995-1996 and/or 1999-2004 that mirrored the federal
25 EIC law (26 U.S.C. § 32), including the Guam Earned Income
26 Program (Chapter 42 of 11 G.C.A.), and filed a timely tax return for
27 the applicable tax year or year(s) in which the credit is sought;
28 and/or (3) actually filed a claim for the EIC with DRT for tax year
1998 under the GTIT or Guam Earned Income Program (Chapter 42
of 11 G.C.A.) on or before April 15, 2002, and have not yet received
full payment for that claim; and/or (4) actually filed a claim for the
EIC with DRT for tax year 1997 under the GTIT or Guam Earned
Income Program (Chapter 42 of 11 G.C.A.) on or before April 16,
2001 and have not yet received full payment for that claim.

27 **2. Schedule of Events.** Section II(a) of the Settlement Agreement
28 provides for the filing of certain submission within seven (7) days of execution of the

1 Settlement Agreement. These filings include a motion to amend the pleadings to
2 conform to the EIC Class definition, motion for conditional class certification, motion for
3 attorneys' fees and costs. Such filings were made within the allowed time frame.
4 Furthermore under Section II(a) the parties have agreed that the instant Settlement
5 Agreement amends and supersedes the 2005 Settlement Agreement. Further, the
6 parties previously agreed that upon preliminary approval of the instant Settlement
7 Agreement, conditional certification of the EIC class, and approval of the issuance of
8 class notice, all of which are complete as of the date of this filing, the previous June 14,
9 2004 settlement agreement shall be mutually rescinded and of no further force and
10 effect and that the stipulated order dated June 17, 2004 granting preliminary approval to
11 that previous agreement shall be vacated.

12 Section II(b) provides a time frame ("Opt-Out Date") and the procedures through
13 which persons wishing to request exclusion from the EIC Class and the Settlement
14 Agreement may do so. The time frame established is no later than sixty (60) days after
15 the completion of the Class Notice period defined in Section III of the Settlement
16 Agreement. The Opt-Out Date as provided in the Notice of Pendency and Proposed
17 Settlement of Class Action ordered by the Court following Preliminary Approval of the
18 Settlement in this matter occurred on May 8, 2007 at 3:00 p.m.

19 Section II(c) provides the time table in which the final Fairness Hearing shall occur
20 as well as deadlines for filing any motions to intervene, motions for final certification of
21 the EIC class, supplemental filings regarding attorneys' fees, filings regarding objections
22 to or comments in favor of the Settlement Agreement.

23 **3. Class Notice.** Section III of the Settlement Agreement deals with
24 notice to the EIC Class. Under the Settlement Agreement, in order to "achieve the best
25 notice that is reasonably practicable, the Parties have determined to engage in both
26 individual notice and notice by publication to the EIC Class." Settlement Agreement §
27 II(a). Notice by publication was effected through publication in both the Pacific Daily
28 News and the Marianas Variety and individual notice was issued by mail to potential

1 claimants ascertained based on records compiled by the Guam Department of Revenue
2 and Taxation in compliance with the extensive procedures provided for by the Settlement
3 Agreement. The parties submitted proof of Notice for the Court's reference. Both the
4 Department of Administration and the Department of Revenue and Taxation have
5 complied with the reporting requirements of the Court and final reports are expected to
6 be issued following the relevant dates as ordered by the Court.

7 **4. Settlement Benefits for Class Members.** The Settlement
8 Agreement provides payments to EIC class members for Tax Years 1995-2004, and
9 requires the Government of Guam to pay the EIC for tax years beyond 2004. See
10 *generally* Settlement Agreement § IV. In contrast to the 2005 Settlement Agreement,
11 the instant Settlement Agreement provides that upon preliminary approval, \$10 million
12 from the Government's tax reserve funds were to be made available to pay a portion of
13 EIC claims for tax year 1998. *Id.*, §§ V(i), VI(e)(ii). Additionally, upon preliminary
14 approval, the Government was to begin paying remaining EIC claims for tax year 1997.
15 *Id.*, § VI(e)(ii). These new provisions allow eligible Guam taxpayers to begin receiving
16 EIC benefits without further delay. The prompt processing of such claims by the
17 Department of Revenue and Taxation can occur in a relatively short time period because
18 EIC claims for those two (2) tax years are already on file with the Department of
19 Revenue and Taxation, as the Government allowed taxpayers to file for the EIC for those
20 specific tax years under the Guam Earned Income Program. Further specifics of the
21 foregoing benefits are set forth below.

22 *EIC Payments for Tax Years 1995-2004* – If the Court approves the
23 Settlement Agreement, amounts will be paid to EIC class members for tax years 1995-
24 2004. Although class members will not receive interest on their claims, a substantial
25 amount – up to \$90 million – will be made available for all EIC claims for tax years 1995-
26 1996 and 1998-2004. *Id.*, § IV(a). All outstanding EIC claims for tax years 1997
27 constitute an additional amount outside of the \$90 million and will be paid pursuant to
28 the terms of the Settlement Agreement. See, e.g., *id.*, § IV(d). Funding for the \$90

1 million amount will be obtained by devoting at least 15% of any amounts that are placed
2 into the Government of Guam's tax refund reserve funds, which are the funds used to
3 pay general tax refunds (see Settlement Agreement § V(a)). Funding for payment of
4 1997 claims will be obtained from a reserved amount currently in the Government of
5 Guam's tax reserve funds. *Id.*, § V(h).

6 For tax years 1995, 1996, 1999, and 2000 (claims for which there is
7 an arguable risk of a time bar if litigated), the Government has agreed to pay up to \$15
8 million for all EIC claims for those years. *Id.*, § IV(a)(ii). The amount will be divided
9 proportionally among each claimant found eligible by DRT (applying the requirements of
10 26 U.S.C. § 32 as it applied in each applicable year) based on the total combined value
11 of their claim or claims for those years. For tax years 1998 and 1997, there does not
12 exist the apparent risk of a time bar because the Government allowed the filing of EIC
13 claims for those years. Accordingly, the Government will make available up to \$15
14 million for tax year 1998, and will pay remaining claims for tax year 1997. As noted
15 above, processing of payments for those tax years were to commence immediately upon
16 preliminary approval of the Settlement Agreement. For tax years 2001-2004, up to \$15
17 million will be made available to pay claims for those years. *Id.*, §§ IV(a)(iii)-(vi). The
18 Settlement Agreement also contains certain "roll-over" provisions in which any remaining
19 amounts in a particular year will be rolled-over to fund payments for certain other years.
20 *E.g., id.*, §§ IV(a)(i)(3), -(ii)(1), -(ii)(3), -(iii)(1), -(iii)(3). Payments for tax years other than
21 1997 and 1998, will not occur until final approval of the Settlement Agreement and until
22 all claims for those two years are paid pursuant to the terms of the Settlement
23 Agreement. *Id.*, §§ VI(e)(iii)-(iv).

24 *EIC Payments for Tax Years Beyond 2004* – The Settlement
25 Agreement provides for full implementation of the EIC beginning with tax year 2005 for
26 all qualifying taxpayers (see Settlement Agreement § IV(d)).

27 **5. Funding.** Funding for the Settlement Agreement benefits will be
28 made by reserving a minimum of 15% of each amount set aside or earmarked by the

1 Government or Legislature for income tax refunds and placed into either the Income Tax
2 Reserve Fund or the Income Tax Refund Efficient Payment Trust Fund. Settlement
3 Agreement § V. And in order to assure the class that such funds are being set aside,
4 the Guam Department of Administration ("DOA") will provide monthly reports. *Id.*, §
5 V(b)(ii).

6 By providing funding mechanisms for each expenditure under the Settlement
7 Agreement, the Agreement addresses concerns regarding the Illegal Expenditure Act (5
8 G.C.A. § 22401) that had caused, in part, opposition to the previous settlement
9 agreement of June 14, 2004 (see *id.*, § V(c)). However, the Settlement Agreement also
10 provides the flexibility for the Governor to utilize other funding sources to satisfy the
11 Government's obligations under the Settlement Agreement, as permitted by law. *Id.*, §
12 V(d). Notably, the Agreement leaves the Respondents free to pursue federal
13 reimbursement of the EIC, while providing the class with a final resolution and payment
14 of their claims now (see Settlement Agreement § X(e)).

15 **6. Claims Administration.** Section 6 of the Settlement Agreement
16 deals with the administration of EIC claims. Despite creating a class action, the
17 Settlement Agreement avoids imposing an undue burden on the Court or the
18 Government by utilizing the existing structures to process tax claims (see Settlement
19 Agreement § VI(a)). The Settlement Agreement uses the EIC claim forms created
20 pursuant to Executive Order 2005-001 and otherwise tracks Executive Order 2005-001
21 in terms of claims procedures (see Settlement Agreement § VI(b))—the same forms and
22 procedures that were upheld by the District Court of Guam in the Order dated June 16,
23 2005 in *Simpao, et al. vs. Govt. of Guam*, Dist. of Guam Case No. CV04-00049.

24 **7. Setting of Court Dates and Issuance of Class Notice.** Following
25 and pursuant to the Court's Order granting preliminary approval, the parties amended
26 the proposed Notice to Class Members to reflect the relevant dates set by the Court. The
27 Notice provides the following dates:
28

- 1 • The “Opt-Out Date” under Section II(b)(i) of the Settlement Agreement was
2 set for May 8, 2007 at 3:00 p.m.
- 3 • The date by which any motions for intervention are to be filed and served
4 under Section II(c)(i) of the Settlement Agreement was set for May 15,
5 2007.
- 6 • The date by which any objection or comment on the Settlement Agreement
7 must be filed and served, and the date by which any responses shall be
8 filed, under Section III(c)(vi) of the Settlement Agreement was set for June
9 22, 2007.
- 10 • The date for the “Fairness Hearing” as that term is defined in Section II(c)(i)
11 of the Settlement Agreement was set for July 6, 2007.

12 Additionally, Notice included a brief description of Class Counsel’s motion for
13 attorneys’ fees and costs.

14 **B. The Legal Standard for Final Approval**

15 The parties presently seek final approval of the Settlement Agreement pursuant to
16 the terms of the Settlement Agreement as well as the express terms of Rule 23 of the
17 Federal Rules of Civil Procedure. As provided in Rule 23(c), “the court may approve a
18 settlement, voluntary dismissal, or compromise that would bind class members only after
19 a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair,
20 reasonable, and adequate.” The Moving Parties submit that the Settlement Agreement
21 reached in this matter meets the requirements of law and accordingly seek this Court’s
22 final approval.

23 There is strong judicial policy in favor of settlement. Principe v. Ukropina (In re
24 Pacific Enters. Sec. Litig.), 47 F.3d 373, 378 (9th Cir. 1995). See also Util. Reform
25 Project v. Bonneville Power Admin., 869 F.2d 437, 443 (9th Cir. 1989). The principle
26 applies with particular force where, as here, settlement involves class action lawsuits.
27 See Officers for Justice v. Civil Serv. Comm’n, 688 F.2d 615, 615 (9th Cir. 1982); Van
28

1 Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976); Wilkerson v. Martin
2 Marietta Corp., 171 F.R.D. 273, 284 (D. Colo. 1997).

3 As the Ninth Circuit held in Hanlon v. Chrysler Corp.,

4 [a]ssessing a settlement proposal requires the district court
5 to balance a number of factors: the strength of the plaintiffs'
6 case; the risk, expense, complexity, and likely duration of
7 further litigation; the risk of maintaining class action status
8 throughout the trial; the amount offered in settlement; the
9 extent of discovery completed and the stage of the
proceedings; the experience and views of counsel; the
presence of a governmental participant; and the reaction of
the class members to the proposed settlement.

10 150 F.3d 1011, 1027 (9th Cir. 1998)(citing Torrisi v. Tucson Elec. Power Co., 8 F.3d
11 1370, 1375 (9th Cir. 1993). Further, “[i]t is the settlement taken as a whole, rather than
12 the individual component parts, that must be examined for overall fairness...The
13 settlement must stand or fall in its entirety.” Hanlon v. Chrysler Corp., supra at 1027
14 (citing Officers for Justice v. Civil Serv. Comm’n of San Francisco, 688 F.2d 615, 628
15 (9th Cir. 1982)). The Court may not “delete, modify or substitute certain provisions.” Id.

17 All parties to the settlement in this matter attest to the fairness of the agreement
18 reached without reservations. As described above, this agreement is the product of
19 almost three years of pleadings, motions and negotiations. Prior to this agreement, the
20 parties made multiple attempts at resolution of this matter with mixed results. The
21 parties agree that the instant agreement fully considers and accounts for the interests of
22 all parties involved, offers real relief to the Petitioners and the Class while
23 simultaneously providing workable and efficient methodology for disbursement of funds.

25 The parties stipulate that the actions Petitioners instituted are meritorious and
26 that Petitioners and the Class are entitled to the relief provided in the settlement
27 agreement. Given the relative rarity of class action cases in this jurisdiction, this
28 settlement alleviates the extreme risk involved in fully litigating Petitioners’ claims, which

1 involve questions of law that by all accounts are matters of first impression for this or
2 any Court. Further, because no case like this has ever been previously attempted in this
3 jurisdiction, the potential outcome could have staggering consequences for either or
4 both Petitioners and Respondents in the event these matters are fully litigated.

5 In contrast, Settlement provides an opportunity for the parties to provide
6 substantial, certain, and immediate redress for Petitioners' claims in an amount and
7 manner that is acceptable to Respondents. Under the Settlement Agreement, the
8 Respondents have agreed to allocate over \$90 million to compensate eligible Guam
9 taxpayers for EIC claims from 1995-2004. Furthermore, EIC claims beginning with tax
10 year 2005 will be paid henceforth on the same terms as they would be normally
11 processed and paid, so that the risk of subsequent litigation regarding future EIC claims
12 is significantly mitigated or altogether eliminated.
13

14 The requisite fairness review does not require a finding that the settlement
15 represents the best possible outcome for a particular party.
16

17 ...[I]t is the very uncertainty of outcome in litigation and
18 avoidance of wasteful and expensive litigation that induce
19 consensual settlements. The proposed settlement is not to
20 be judged against a hypothetical or speculative measure of
21 what might have been achieved by the negotiators." Officers
22 for Justice v. Civil Serv. Comm'n, 688 F.2d at 625 (emphasis
23 in original). Thus, "the very essence of a settlement is
24 compromise, 'a yielding of absolutes and an abandoning of
25 highest hopes.'" Id. at 624 (citations omitted). As the Second
26 Circuit has pointed out: "The fact that a proposed settlement
27 may only amount to a fraction of the potential recovery does
28 not, in and of itself, mean that the proposed settlement is
grossly inadequate and should be disapproved." City of
Detroit v. Grinnell Corp., 495 F.2d 448, 455 & n.2 (2nd Cir.
1974).

26 Linney v. Cellular Alaska Pshp., 151 F.3d 1234, 1242 (9th Cir. 1998). Given the present
27 financial condition and substantial obligations of the Government of Guam, the amounts
28

1 to be paid under the Settlement Agreement are significant, and represent a fair
2 compromise in light of the risks, costs, and delay associated with the prosecution of
3 complex cases, particular cases against a government entity. Even if the cases were to
4 proceed to litigation and a judgment were obtained at trial against the Government and
5 Respondents, the recovery might be of no greater utility to class members, and might be
6 substantially less valuable, than the proposed settlement which establishes an
7 immediate mechanism for processing and payment of claims so that Guam's working
8 poor can begin receiving the financial assistance that the EIC was intended to provide
9 for them. As the Court in Hanlon, supra, propounded:

11 Settlement is the offspring of compromise; the question we
12 address is not whether the final product could be prettier,
13 smarter or snazzier, but whether it is fair, adequate and free
14 from collusion. In this regard, the fact that the overwhelming
majority of the class willingly approved the offer and stayed
in the class presents at least some objective positive
commentary as to its fairness.

15 Similarly, to date over 54,000 claims have been filed following Notice given pursuant to
16 this Court's preliminary approval of the settlement agreement. Though a few days
17 remain for the filing of objections, no objections have been filed thus far, indicating the
18 general perception among the Class that the settlement is fair, adequate and
19 reasonable with regards to their rights in this matter. To the extent that any individual
20 member believes the agreement reached by the parties is not in the member's best
21 interest, that member has the opportunity to opt-out. Notably, only one of the three
22 petitioners in the Simpao matter, Petitioner Christina M. Naputi, has opted out of the
23 settlement thus far. To date, only four (4) individuals including Ms. Naputi have opted
24 out of the settlement. To say that the agreement has received overwhelming support
25 from would-be members of the Class would be a severe understatement.
26
27
28

1 As discussed in the Joint Motion for Preliminary Approval of Class Action
2 Settlement, counsel for all parties involved in this matter indisputably engaged in
3 rigorous and skilled representation of the parties' respective interests at all stages of
4 litigation. The agreement ultimately reached through mediation is the product of the
5 collective efforts of counsel in extensive arms-lengths negotiations. There is an initial
6 presumption that a proposed settlement agreement is fair and reasonable when it is the
7 result of arm's-length negotiations. See Williams v. Vukovich, 720 F.2d 909, 922-923
8 (6th Cir. 1983) ("The court should defer to the judgment of experienced counsel who has
9 completely evaluated the strength of his proofs"); In re Inter-Op Hip Prosthesis Liab.
10 Litig., 204 F.R.D. 359, 380 (N.D. Ohio 2001) ("when a settlement is the result of
11 extensive negotiations by experienced counsel, the Court should presume it is fair");
12 Hanlon, supra at 1027 ("the court's intrusion upon what is otherwise a private
13 consensual agreement negotiated between the parties to a lawsuit must be limited to
14 the extent necessary to reach a reasoned judgment that the agreement is not the
15 product of fraud or overreaching by, or collusion between, the negotiating parties, and
16 that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned"
17 (citations omitted).

18 Here, the proposed settlement is the product of arm's-length negotiations. The
19 origin of negotiations for some of the core terms of the agreement began in 2005 in
20 connection with settlement of the Santos action during that period. After the Court
21 consolidated the actions, including the Torres action, the parties engaged in extensive
22 mediation in April 2006 in Guam before an experienced JAMS mediator, the Hon.
23 William J. Cahill, a retired jurist. The 2006 mediation resulted in an agreement that
24 expanded the EIC class definition, incorporated settlement of an addition case (the
25 Torres action), and resulted in enhanced EIC benefits for the expanded class including

ultimate payment of all remaining EIC claims for tax year 1997, and immediate payment of millions of dollars for a portion of 1998 and 1997 EIC claims.

C. The Class Should Receive Final Certification for Settlement Purposes

The Petitioner and Plaintiff in the *Santos* and *Torres* actions will submit a joint motion for final certification of EIC settlement class within the time frame provided for under the Section II of the Settlement Agreement. The prerequisites for a class action under the Federal Rules of Civil Procedure have been satisfied for purposes of settlement.

IV. CONCLUSION

For the reasons stated herein and in other forthcoming filings to be made pursuant to the Settlement Agreement, the Moving Parties respectfully request that the Court (1) grant final approval of the Settlement Agreement; (2) grant final certification of the EIC class as defined in the Settlement Agreement for settlement purposes; and (3) grant such other and further relief as the Court deems just and proper.

Respectfully submitted this 26th day of May, 2006.

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